SECURITIES LAWS AND CORPORATE SOCIAL RESPONSIBILITY: TOWARD AN EXPANDED USE OF RULE 10B-5

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1. INTRODUCTION

As U.S. companies expand overseas, in search of a larger customer base and the cheaper labor available in developing countries, there has been concomitant concern that such transnational corporations ("TNCs") are subordinating human rights and other social responsibilities to the pursuit of higher corporate profit.

Numerous corporations have been accused of violations of labor rights, such as the use of forced and child labor.[1] More egregious human rights violations include those alleged against Royal Dutch Petroleum ("Royal Dutch Shell") and Unocal Corporation. Royal Dutch Shell has been accused of complicity in the execution of Nigerian dissidents who protested the company's environmental policies.[2] Unocal Corporation has been sued in California for hiring the military of Myanmar (formerly Burma) to provide security for its pipeline project there, despite allegedly knowing that the military had tortured Burmese citizens in order to compel their labor on the Unocal pipeline project.[3]

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[1] *See* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 51-2 (2002) (giving examples of corporations, including Enron Corporation, Royal Dutch Shell, and Unocal, who participate in human rights abuses in pursuit of profits).

[2] *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92-93 (2nd Cir. 2000) (detailing the allegations against Royal Dutch Petroleum and Shell Transport and Trading Co., P.L.C.).

[3] *See* John Doe I v. Unocal Corp., Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *3, *83 (9th Cir. Sept. 18, 2002) (reversing the

Scholars and activists have raised concerns that TNCs are essentially operating with impunity for violations of international standards on human rights, environmental obligations, and labor rights in developing countries. This impunity is the result of the inapplicability of international laws to corporations, combined with the limited geographical reach of U.S. laws. International laws and obligations pertain primarily to state actors, not to private actors in the international arena.[4] The developing countries into which TNCs expand often have less stringent laws than those in the U.S. regarding labor and environmental obligations.[5] Furthermore, U.S. labor and environmental laws generally do not apply extra-territorially to crimes committed in developing countries.[6]

The responses by human rights activists to such violations, as well as the response by international organizations, such as the United Nations ("U.N.") and the Organization for Economic Cooperation and Development ("OECD"), have been legion. In recent years, activists have brought claims against TNCs in U.S. federal courts under the Alien Tort Claims Act[7] ("ATCA") and under state laws prohibiting false advertising.[8] The U.N. and other interna-

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District Court's dismissal of the Alien Tort Claims Act ("ATCA") claims for forced labor, murder and rape against Unocal). On February 14, 2003, the Ninth Circuit granted Unocal a hearing en banc. John Doe I v. Unocal Corp., Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2003 U.S. App. LEXIS 2716, *3 (9th Cir. Feb. 14, 2003) (vacating the panel decision).

[4] *See* Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 155 (1997) (detailing the traditional role of intergovernmental organizations as primary actors in protecting human rights).

[5] One problem is that in an effort to attract much-needed business, developing countries have relaxed labor and environmental standards and reduced their calls for international regulation. *See* JUDITH RICHTER, HOLDING CORPORATIONS ACCOUNTABLE: CORPORATE CONDUCT, INTERNATIONAL CODES, AND CITIZEN ACTION 12 (2001) (discussing the history of attempts to regulate transnational corporations ("TNCs") at the international level and the need for further regulation).

[6] Such crimes would instead fall under the jurisdiction of the country in which the TNC is operating. *See generally* Sarah M. Hall, Note: *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401, 401-02 (2002) (discussing the growing liability of TNCs under U.S. law).

[7] The ATCA reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2004).

[8] *See, e.g.*, Kasky v. Nike Inc. 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003) (per curiam) (finding a claim against Nike for allegedly making false statements in advertisements is valid under a California law prohibiting false advertising) *cert. granted*, 537 U.S. 1099 (2003), *cert. dismissed*, 539 U.S. 654 (2003).

tional organizations have attempted to establish conduct standards for TNCs.[9] Additionally, shareholders and scholars have called for the Securities and Exchange Commission ("SEC") to establish more stringent reporting regulations, including requirements that TNCs disclose their compliance with international environmental and social obligations and liabilities.[10]

Each of these efforts has met with only limited success. The SEC has largely ignored calls to impose new disclosure requirements relating to international social issues.[11] The ATCA has been effective in holding corporations accountable for the most severe human rights violations overseas, but jurisdictional and other considerations may limit its future use.[12]

Given the lack of international regulations governing TNCs' activities, and lack of U.S. regulations requiring disclosure of TNCs' records on human rights and other social obligations, alternative approaches must be used to ensure that TNCs act responsibly. In this comment, I intend to show that one potential approach, thus far largely ignored by social activists, is to hold corporations responsible under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act") for false or misleading statements regarding their overseas operations.[13]

Rule 10b-5 provides a private right of action to shareholders injured in the sale or purchase of a security by false or misleading statements by company insiders.[14] Although the SEC does not require disclosure of information related to human rights, overseas labor, and related social issues,[15] TNCs have already been voluntarily releasing such information, primarily in an effort to improve

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[9] *See, e.g.*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT ("OECD"), OECD PRINCIPLES OF CORPORATE GOVERNANCE 3 (1999) [hereinafter OECD PRINCIPLES] (establishing preliminary guidelines for governance of TNCs).

[10] *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1201 (1999) (discussing the need for increased disclosure requirements from the Securities and Exchange Commission ("SEC")).

[11] *Id.* at 1252-63.

[12] *See infra* Section 2.3 (discussing the use and limitations of the ATCA, which provides jurisdiction in U.S. courts for torts committed against aliens).

[13] *See infra* notes 49-50, 52-53 (discussing the wording and purpose of § 10(b) and Rule 10b-5).

[14] *See, e.g.*, Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946) (stating that a private right of action does exist for injured investors).

[15] *See* Williams, *supra* note 10, at 1201-02 (discussing the type of information an expanded social disclosure would include).

public relations and attract consumers and investors.[16] As TNCs increasingly release information regarding their overseas operations, and institutional investors and socially responsible investors consider such information relevant to investment decisions, Rule 10b-5 can be used to ensure that TNCs accurately disclose their compliance with international human rights and environmental standards.

2. BACKGROUND

Regulation and oversight of TNCs has been attempted by international organizations such as the U.N. and the OECD, by the U.S. government, and by the TNCs themselves. Each of these attempts has, however, suffered from the essentially voluntary nature of the form.

2.1. International Regulation of TNCs

During the 1960s and 1970s, human rights and environmental activists from the United States and developing countries began to call for international regulation of TNCs' activities in host countries.[17] Efforts to establish a U.N. code of conduct for TNCs were abandoned, however, in the more conservative business climate of the 1980s, and were not renewed until the late 1990s, when the collapse of the Asian financial market caused international concern about the effects of globalization on developing countries.[18]

In January 1999, U.N. Secretary General Kofi Annan proposed the U.N. Global Compact.[19] Corporations that agree to join the Global Compact are expected to adhere to its nine principles, including: upholding the right to freedom of association and collec-

[16] Examples of companies that have bowed to pressure from social activists include The Gap. *See* Debora L. Spar, *The Spotlight and the Bottom Line: How Multinationals Export Human Rights*, 77 FOREIGN AFF. 7, at 9 (asserting that, "[a]fter several high-profile protests in 1995, including one at a Manhattan store, The Gap signed an agreement with the National Labor Committee committing itself to independent third-party monitoring of its overseas suppliers."). Other companies that have bowed to public pressure include Reebok and Starbucks Coffee. *Id.*

[17] RICHTER, *supra* note 5, at 8.

[18] RICHTER, *supra* note 5, at 10-15 (discussing the efforts of the International Chamber of Commerce to work with the United Nations ("U.N.") in the establishment of regulation so that TNCs could work within predicable legal and regulatory frameworks).

[19] U.N. Global Compact, *What is the Global Compact?* (describing the history and purpose of the U.N. Global Compact), *at* http://www.unglobalcompact.org/content/AboutTheGC/Overview_about.htm (last visited Oct. 19, 2004).

tive bargaining; refraining from using forced labor; abolishing child labor; ensuring they are not "complicit in human rights abuses;" undertaking "initiatives to promote greater environmental responsibility;" and supporting and protecting "internationally proclaimed human rights" within their sphere of influence.[20] The Global Compact is not a binding agreement, nor does it create legal liabilities.[21] However, a TNC that has agreed to abide by the Compact's principles must publish updates on its compliance with the principles in its annual report or similar reports.[22] As such, the U.N. relies on negative publicity and other informal repercussions to ensure compliance with the objectives of the Global Compact.

In 1999, the OECD began work on a draft of its Guidelines for Multinational Enterprises (the "Guidelines"). The Guidelines are intended to establish a "rules-based, values-based framework to globalisation."[23] The Guidelines in their current form strive to ensure that TNCs comply with national and international environmental and labor standards, as well as to demand disclosure of such compliance to shareholders and the host-country public.[24] However, the Guidelines are only aspirational, non-binding standards for TNCs.[25] In addition, because the OECD represents developed countries, the Guidelines have had less credibility among developing countries.[26]

Because of their inherently nonbinding and voluntary nature,

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[20] U.N. Global Compact, *The Ten Principles* (listing the Global Compact's ten principles in the areas of international human rights, the environment, and corruption), *at* http://www.unglobalcompact.org/irj/servlet/prt/portal/prtrot/com.sapportals.km.docs/ungc_html_content/AboutTheGC/TheNinePrinciples/thenine.htm (last visited Oct. 26, 2004).

[21] *See* U.N. Global Compact, *Frequently Asked Questions* (explaining general participation and legalities of joining the Global Compact), *at* http://www.unglobal compact.org/content/AboutTheGC/Questions/faq.htm (last visited Oct. 26, 2004).

[22] *Id.*

[23] OECD, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf (last visited Oct. 26, 2004).

[24] *See id.* at 20 (describing disclosure standards).

[25] *See id.* at 3 (stating that the Guidelines for Multinational Enterprises are not legally binding).

[26] *See generally* VIRGINIA HAUFLER, A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY 62 (2001) (describing Canadian, American, and British government efforts to use voluntary corporate self-regulation on labor issues).

international standards alone are insufficient for ensuring TNC compliance with environmental, labor, and human rights standards.

2.2. Corporate "Codes of Conduct"

In addition to regulatory efforts by international organizations, some TNCs have created voluntary codes of conduct establishing labor, human rights, and environmental standards. Corporate codes of conduct were initially promulgated in the 1980s in response to concerns about TNCs investing in apartheid-era South Africa.[27] The Sullivan Principles, as the first major code was called, obliged signatory companies to abide by principles of workplace non-discrimination as well as provide increased opportunities for "oppressed racial groups."[28] Signatory companies were graded on their compliance, which helped encourage the aggressive implementation of the principles.[29]

Current codes of conduct generally fall into three categories: "vendor standards regarding forced and child labor; standards in support of civil and political rights; and criteria for investment."[30] As of 2000, more than one hundred TNCs had voluntarily adopted such human rights codes.[31] These codes include minimum standards for foreign vendors, as well as prohibitions on child and forced labor.[32] Other standards require that the TNC protect political rights, including the freedom of association.[33] For example, Reebok's human rights policy affirms the company's commitment to freedom of association, non-discrimination, fair wages, and the non-use of forced and child labor.[34]

Because they are voluntary, lack independent enforcement, and rely on self-established standards, ultimately the codes are insufficient for ensuring ethical corporate behavior. Moreover, U.S. law

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[27] *See* Frey, *supra* note 4, at 174-76 (discussing generally the history of the Sullivan Principles and their success in South Africa).

[28] *See id.* at 175 (discussing the requirements of the Sullivan principles).

[29] *Id.*

[30] *Id.* at 177.

[31] *See* Su-Ping Lu, Comment, *Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 611 (2000) (comparing various corporate codes of conduct).

[32] *Id.*

[33] *Id.*

[34] *See* REEBOK INT'L, LTD., OUR COMMITMENT TO HUMAN RIGHTS 5-7 (2003) (detailing Reebok's *Human Rights Production Standards*).

does not require corporations to establish any standards for their overseas ventures. The closest the U.S. government has come to proposing a code of conduct for TNCs was in 1995 when President William J. Clinton proposed a set of Model Business Principles (the "Clinton Code"). The Clinton Code was a set of voluntary principles to which U.S.-based TNCs could adhere in order to demonstrate "their commitment to upholding fundamental human and labor rights."[35] However, adherence to the Clinton Code was never mandatory and ultimately was never adopted by many corporations because the code was seen as too heavily influenced by government interests.[36]

2.3. Liability of TNCs under U.S. Federal and State law

Activists have, in recent years, brought claims against TNCs under the ATCA. The ATCA provides jurisdiction in U.S. courts for tortious acts committed in foreign countries in violation of the law of nations or treaties of the United States.[37] For example, activists used the ATCA to bring claims against Unocal for its alleged complicity with the Burmese military in human rights violations, including rape, murder, forced labor, and torture.[38]

However, despite recent success in the case against Unocal, the effectiveness of bringing claims under the ATCA has been hindered by the unwillingness of U.S. courts to hear claims regarding torts that are not expressly prohibited by treaties to which the United States is a party or that are not violations of the law of nations.[39] Secondly, some courts have held that the ATCA should be reserved for the most egregious tort violations.[40] In addition, courts have been reluctant to hear claims brought under the ATCA

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[35] Frey, *supra* note 4, at 172-73.

[36] HAUFLER, *supra* note 26, at 63 (explaining the reasons for the failure of the Clinton Code).

[37] *See* Alvarez-Machain v. United States, 331 F.3d 604, 608 (9th Cir. 2003) (discussing the ability of a foreign national to bring a claim under the ATCA in U.S. courts), *rev'd sub nom*, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004).

[38] *See, e.g.*, John Doe I v. Unocal Corp., Nos. 00-56603, 00-57197, Nos. 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *3 (9th Cir. Sept. 18, 2002) (using the ATCA to bring a claim against Unocal for torture allegedly committed while building an oil pipeline in Burma).

[39] *See, e.g., Alvarez-Machain*, 331 F.3d at 612 (holding that a violation of the law of nations is required to bring a claim under the ATCA).

[40] *See* De Wit v. KLM Royal Dutch Airlines, N.V., 570 F. Supp. 613, 618 (S.D.N.Y. 1983) (holding that use of the ATCA should be reserved only for cases with "extraordinary circumstances").

if a decision on the claim involves interpreting U.S. foreign policy.[41] These courts contend that the sovereign immunity and the political question doctrines limit their ability to hear such claims.[42]

Activists have also used state and federal advertising law to bring claims against TNCs. For example, activists brought charges against Nike under California's false advertising laws for allegedly false statements regarding working conditions in Nike's subcontractors' factories in Asia.[43] The California Supreme Court permitted the case against Nike to go forward, holding that "when a corporation, to maintain and increase sales, and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception."[44] Nike appealed the case to the U.S. Supreme Court, which, after hearing arguments, did not issue a decision on the grounds that the issue was not "ripe" and because neither party had standing to appeal to the Court.[45] In September 2003, Nike agreed to settle the case for $1.5 million.[46]

False advertising laws remain, however, a largely untested avenue for claims against TNCs. False advertising laws such as California's raise important First Amendment issues and may eventually be found unconstitutional by the U.S. Supreme Court. Moreover, claims are limited by jurisdictional requirements and the limited remedies available under such laws.[47]

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[41] *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985) (holding that sovereign immunity prevented the court from hearing the case). Note also that "law of nations" refers to customary international law, and does not reach private, non-state action. *Id.* at 206-07.

[42] *Id.* at 207-08 (holding that jurisdiction was precluded by sovereign immunity, and that "[w]hether or not this is . . . a matter so entirely committed to the care of the political branches or as to preclude our considering the issue at all, we think it at least requires the withholding of discretionary relief").

[43] *See* Kasky v. Nike Inc., 45 P.3d 243, 247-49 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003) (per curiam) (explaining that plaintiff's claim is based on California's false advertising laws and the suit is in regard to statements made by Nike about its labor practices).

[44] *Id.* at 262.

[45] Nike Inc. v. Kasky, 539 U.S. 654, 657-58 (The "writ of certiorari dismissed as improvidently granted.").

[46] Anitha Reddy, *Nike Settles with Activist in False-Advertising Case*, WASH. POST, Sept. 13, 2003, at E1 (announcing the settlement). In announcing its decision to settle, Nike and Mr. Kasky released a joint statement, saying, "[i]nvestments designed to strengthen workplace monitoring and factory worker programs are more desirable than prolonged litigation . . . ." *Id.* at E2.

[47] For example, remedies available under federal trade laws are very limited—

2.4. U.S. Securities Laws and Disclosure Obligations

In order to ensure efficient markets, prevent fraud, and protect investors, reporting companies must periodically disclose information about their operating and financial practices. Under U.S. securities laws, corporations are required to disclose information upon issuance of stock, quarterly and annually after issue, upon the happening of extraordinary events, and in conjunction with the annual shareholders' meeting.[48] Much of the information required to be disclosed is quantitative information related to the financial results, competitive risks, legal proceedings, and management characteristics.[49] Beginning in the 1970s, activists began calling on the SEC to require disclosure of social obligations, such as compliance with international labor and environmental standards.[50] When these requests were initially made, the SEC determined that such information was not economically "material" and, therefore, companies were not required to disclose the information. Today, however, there are growing numbers of socially responsible investors who clearly consider such information material to their investment decisions.[51]

3. SEA SECTION 10(B) AND RULE 10B-5 AND THEIR APPLICATION TO TNC CONDUCT IN DEVELOPING COUNTRIES

3.1. Background on Rule 10b-5

Because U.S. securities laws do not affirmatively require disclosure of corporate compliance with social obligations, there are limited remedies available under the Securities Exchange Act of 1934 (the "Exchange Act"). However, Exchange Act Section 10(b) and

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options available to the Federal Trade Commission ("FTC") for false advertising are primarily remedial options such as injunctions. *See* Lu, *supra* note 31, at 618 (discussing the FTC's remedial options in deceptive practices cases).

[48] *See* 15 U.S.C. § 13 (2004) (detailing the periodic disclosures that must be made by reporting corporations); *see also id.* § 14 (detailing the disclosures that must be made prior to the annual meeting of shareholders).

[49] *See, e.g.*, 17 C.F.R. § 240.14a-3 (2004) (detailing the information required to be furnished to shareholders upon solicitation of a proxy).

[50] *See* Williams, *supra* note 10, at 1244-52 (discussing the history of Natural Resources Defense Council's ("NRDC") case for expanded disclosure of civil rights and environmental obligations).

[51] *See* Williams, *supra* note 10, at 1206 (discussing the evolving demands of investors, specifically the increasing demand for environmental and civil rights disclosures).

Rule 10b-5 provide one possible remedy. Exchange Act Section 10(b)[52] and Rule 10b-5[53] "together have been called a "'broad, catch-all' antifraud provision"[54] and a "judicial oak which has grown from little more than a legislative acorn"[55] (hereinafter, Section 10(b) and Rule 10b-5 will be collectively referred to as "Rule 10b-5"). Because Rule 10b-5 requires veracity in corporate statements, even when there is no affirmative duty to disclose such information, the rule reaches a broader cross-section of corporate statements than those required in the periodic and annual statements.[56]

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[52] Section 10 prohibits:

> any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Act of 1934 § 10, 15 U.S.C. § 78j (2004).

[53] Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
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> (a) To employ any device, scheme, or artifice to defraud,
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> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
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> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2004).

Hereinafter, Section 10(b) and Rule 10b-5 will be referred to collectively as "Rule 10b-5."

[54] Perry E. Wallace, *Disclosure of Environmental Liabilities Under the Securities Laws: The Potential of Securities-Market-Based Incentives for Pollution Control*, 50 WASH. & LEE L. REV. 1093, 1115 (1993) (discussing the potential use of Rule 10b-5 for disclosing compliance with U.S. environmental laws (quoting CHARLES R. O'KELLEY, JR. & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 839 (1992)).

[55] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

[56] Wallace, *supra* note 54, at 1115 ("[T]he rule . . . appl[ies] even when none of the initial, periodic, or continuous mandatory disclosure provisions of the [Securities Act of 1933 and the Securities Exchange Act of 1934] that draw upon Regula-

Although securities laws do require disclosure of issues that the SEC has determined to be material to investors,[57] the SEC has largely deemed immaterial corporate compliance with international human rights and labor standards.[58] Therefore, there is no mandatory disclosure of such issues.[59] However, in recent years, some TNCs have opted to voluntarily highlight their compliance with labor and human rights obligations, in addition to their environmental obligations, which they generally must disclose.[60]

Rule 10b-5, which permits private rights of action for fraudulent or misleading statements by corporate insiders, provides a form of "gap filling" because it can ensure that when corporations do make such voluntary disclosures regarding compliance with human and labor rights standards, their statements are not misleading. Moreover, because this right can be enforced privately, investors do not have to rely on the SEC, which historically has been neither willing nor legally permitted to enforce violations.[61]

3.2. Elements of a Private Claim under Rule 10b-5

In order to prove a private right of action under a Rule 10b-5 claim, the plaintiff must show that the defendant is subject to Rule 10b-5,[62] that there was misrepresentation or omission[63] of a mate-

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tion S-K apply, so long as the underlying circumstances can be construed to create a duty of disclosure.").

[57] This includes some disclosure of liabilities stemming from compliance with domestic environmental regulations and civil rights obligations. *See* Williams, *supra* note 10, at 1246-48 (noting that although the SEC decided not to expand disclosure obligations in the 1970s, some disclosure in environmental and civil rights suits was already required).

[58] *See id.* at 1252 (discussing the SEC's determination that requiring such disclosure would be beyond the scope of SEC authority as envisioned by the Congress).

[59] *Id.*

[60] These disclosures are not always made in the annual reports, but are often listed as corporate codes of conduct available on websites and in other public places. For example, Reebok's information on its human rights program is available on the Company Information page of its website, but is not included in the annual report to shareholders. REEBOK INT'L LTD., *supra* note 34.

[61] The SEC has largely failed to bring actions against corporations failing to disclose violations and liabilities under U.S. environmental laws. *See* ROBERT REPETTO & DUNCAN AUSTIN, COMING CLEAN: CORPORATE DISCLOSURE OF FINANCIALLY SIGNIFICANT ENVIRONMENTAL RISKS 11 (2000) (noting that in the past twenty-five years, the SEC has brought only three cases of enforcement against corporations for insufficient disclosure of environmental risks or liabilities).

[62] *See In re* Cady, Roberts & Co., 40 S.E.C. 907, 911-12 (1961) ("Rule 10b-5 appl[ies] to security transactions by 'any person.'").

rial fact[64] with intent to deceive or recklessness in the misstatement,[65] upon which the plaintiff relied[66] in connection with either a purchase or sale of a security.[67]

3.2.1. Misrepresentation or Omission

In order to make a claim under Rule 10b-5, a private investor must demonstrate that the corporation made a false or misleading statement (or omission) of a "material" fact. The Supreme Court has determined that a material fact is one where "'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'"[68] In cases where the corporation is releasing information regarding a corporate development that is contingent or speculative in nature, the Second Circuit has determined that materiality also depends "upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."[69]

3.2.2. "In Connection With" and Materiality Requirements

In order to sustain a claim under Rule 10b-5, a private plaintiff must demonstrate that he or she purchased or sold a security during the relevant period when the fraud was at issue.[70]

Additionally, the plaintiff must show that the purchase or sale was "in connection with" the false or misleading statement. The "in connection with" element is typically one of the most difficult elements to prove in a Rule 10b-5 action.[71]

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[63] *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (holding that information regarding potential mineral discovery was material).

[64] *Id.*

[65] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193-94 (1976) (holding that intent to deceive is necessary to sustain a Rule 10b-5 claim).

[66] *See, e.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 243 (1988) (noting that "reliance is an element of a Rule 10b-5 cause of action").

[67] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749-55 (1975).

[68] *See Basic Inc.*, 485 U.S. at 231-32 (holding that "material information" may include merger negotiations (quoting TSC Industries, Inc. v. Northway Inc., 426 U.S. 438, 449 (1976)).

[69] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968).

[70] This restriction does not, however, apply to cases brought by the SEC against corporate insiders. *Blue Chip Stamps*, 421 U.S. at 749-55.

[71] LARRY D. SODERQUIST & THERESA A. GABALDON, SECURITIES LAWS 144 (2004) (noting that the Supreme Court tightened the "in connection with" requirement of

The issue is fairly straightforward in the context of public dissemination of false or misleading information.[72] In these types of cases, courts have held that the "in connection with" requirement "may be established by proof of the materiality of the misrepresentation and the means of its dissemination."[73] Moreover, in such cases, "it is irrelevant that the misrepresentations were not made for the purpose or the object of influencing the investment decisions of market participants."[74] This standard upheld earlier decisions permitting a wide variety of types of information released, and forms of such information, to meet the reliance requirement. For example, in *SEC v. Texas Gulf Sulphur Co.*, the Second Circuit held that the "in connection with" requirement is met whenever "assertions are made . . . in a manner reasonably calculated to influence the investing public . . . if such assertions are false or misleading or are so incomplete as to mislead."[75]

Over the years, courts have considered a number of factors in determining whether the "in connection with" requirement has been met. First, the Supreme Court indicated that fraud must be in a device upon which a reasonable investor would rely.[76] Examples of such devices include proxy statements, quarterly and annual reports, and other official communications with shareholders.[77] However, some lower courts have been willing to consider statements made in non-traditional settings, such as those in advertisements in medical journals[78] or press releases,[79] as sufficient for

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Blue Chip Stamps and *Hochfelders*, decided in 1975 and 1976, respectively).

[72] *Id.*

[73] Semerenko v. Cendant Corp., 223 F.3d 165, 176 (3d Cir. 2000).

[74] *Id.* The court further noted that the purpose of Rule 10b-5 is "best satisfied by a rule that recognizes the realistic causal effect that material misrepresentations, which raise the public's interest in particular securities, tend to have on the investment decisions of market participants who trade in those securities." *Id.*

[75] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968).

[76] *Id.* at 860 (explaining that the legislative history of Section 10(b) indicated that the "device . . . be of a sort that would cause reasonable investors to rely thereon.").

[77] *See In re* Ames Dep't Stores Inc. Stock Litig., 991 F.2d 953, 963, 966-67 (2d Cir. 1993) (emphasizing that "securities markets are highly sensitive to press releases and to information contained in all sorts of publicly released corporate documents, and the investor is foolish who would ignore such releases.").

[78] *See In re* Carter-Wallace Inc. Sec. Litig., 150 F.3d 153, 156 (2d Cir. 1998) (holding that "[u]nder the 'cause-and-effect' test, we cannot say that, as a matter of law, detailed drug advertisements using technical jargon and published in sophisticated medical journals can never constitute statements made 'in connection with' a securities transaction.").

meeting this requirement. As a result, courts consider on a case-by-case basis whether the "in connection with" requirement is met and can use various types of corporate information that has been released. Indeed, in In re *Ames Dept. Stores Inc. Stock Litig.*, the Court stated that limiting the requirement only to statements made in issuing documents "would eliminate the vast majority of private Rule 10b-5 actions and subvert the [Exchange] Act's efforts to protect investors from deliberate fraud."[80]

3.2.2.1. Materiality and Corporate Statements Regarding Human Rights and Other Social Responsibilities

Scholars and activists have recommended bringing Rule 10b-5 claims against TNCs that fail to make required disclosures regarding environmental liabilities.[81] However, Rule 10b-5 can also be the basis of claims even in cases where no such disclosure is required. Moreover, Rule 10b-5 is not limited to environmental liabilities. Rather, the rule can be used to ensure accountability of all types of social responsibility, including labor and human rights. Rule 10b-5 has the potential to become another weapon in the arsenal of shareholders seeking to ensure greater corporate transparency. As growing numbers of corporations find financial incentives to disclose, even advertise, their records in the human rights, labor, and environmental areas, Exchange Act Rule 10b-5 can be used in conjunction with such public statements to help enforce corporate human rights and environmental obligations at the international level.

3.2.2.2. Materiality and the International Obligations of TNCs

The primary constraint preventing the use of Rule 10b-5 claims for human rights and other international violations is that the defendant corporation can argue that such information is not "material" to an investor's decision to purchase or sell a security.[82] This argument can be persuasive, particularly in light of the SEC's conclusion in the 1970s that "because the primary reason for investing

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[79] In re *Ames Dep't. Stores Inc. Stock Litig.*, 991 F.2d at 963.

[80] *Id.*

[81] *See, e.g.*, Wallace, *supra* note 54, at 1115-19 (noting that Rule 10b-5 could be used for failure to disclose environmental liabilities even before such liabilities would need to be reported to the SEC).

[82] *See* Williams, *supra* note 10, at 1251 (discussing evidence that social investors are a distinct minority).

is to receive an economic return, investors were primarily concerned with economic, not social, issues in making investment decisions."[83] As a result of its decision, the SEC decided to "continue to rely upon an economic understanding of materiality in weighing disclosure proposals."[84]

However, changes in the business environment as well as a new understanding of the influence of social information on economic returns can rebut the argument that social responsibility is not a material factor in weighing investment decisions.[85] In addition, as previously noted, some studies have shown a positive connection between corporate profits and the disclosure of liabilities.[86] Moreover, business executives are increasingly touting the benefits of social responsibility.[87]

3.2.2.3. Corporate Disclosure and Codes of Conduct

Although TNCs are not required to release information on their compliance with international norms of social responsibility, they are increasingly doing so anyway. TNCs release this information in advertisements, annual reports, and press releases. For example, The Gap highlights in its annual report and on its website its effort to comply with international labor and environmental standards.[88]

TNCs and other corporations frequently announce that they are

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[83] *Id.*

[84] *Id.*

[85] *Id.* at 1253.

[86] *See generally* REPETTO & AUSTIN, *supra* note 61, at 5 (noting that the impact on profits is largely positive); Eric Engle, *Corporate Social Responsibility (CSR): Market-based Remedies for International Human Rights Violations?*, 40 WILLAMETTE L. REV. 103, 113 (2004) (noting that no study has shown that social responsibility decreases profits).

[87] *See, e.g.*, David Brown, *U.S. Urged to Monitor Global Labor Policies*, WASH. POST, Jan. 12, 2004, at A15 (noting that some TNCs are advocating that the SEC require disclosure of liabilities resulting from social responsibilities). Bruce Moats, Vice President of Levi-Strauss, said of his company's relatively elaborate worker treatment standards, "[m]y competitors spend a lot more than I do on damage control. While I can't point to specific savings by having this program, I can say I don't spend a lot of money on reversing bad behavior." *Id.*

[88] *See* Gap Inc., *Social Responsibility*, (highlighting the social responsibility of the Gap and its subsidiaries), *at* http://www.gapinc.com/social_resp/social_resp.htm (last visited Nov. 16, 2004); *see also* Gap Inc., *Financials & Media* (including a link to financial information including the 2002 Annual Report), *at* http://www.gapinc.com/financmedia/financmedia.htm (last visited Nov. 16, 2004).

adhering to their voluntarily developed corporate "codes of conduct" or guidelines for best business practices. Studies of conduct codes have shown that they were not adopted because of "simple altruism on the part of their directors, but rather from an awakened awareness of the importance of the firm's image to its customers, workforce, and investors. Reputational damage can quickly affect bottom-line profits, while investment in social responsibility could reap long-term benefits."[89] An OECD study of 246 conduct codes indicates that corporate conduct codes focus on a variety of issues, including labor and environmental standards, compliance with the law in the host country, and issues that may lead to corporate liability.[90]

Critics who contend that corporate codes of conduct are ineffective note that TNCs rely on internal monitoring for enforcement of the codes,[91] and the majority use self-defined standards.[92] However, although voluntarily adopted codes of conduct are generally not considered legally binding, scholars have asserted that corporate conduct codes may, in fact, have "indirect legal effects."[93] For example, TNCs may be held liable at the state level for regulatory violations because "firms proclaiming their adherence to a code create expectations which may be legally enforceable by their customers or other stakeholders."[94]

In one prominent example of this potential liability, in a letter to the editor published in the San Francisco Chronicle, Nike's Director of Communications asked consumers to remember that Nike established the sporting good "industry's first external monitoring program to ensure that local government laws on wages and hours are being met."[95] Similar letters, and the veracity of their assertions, were later at issue in litigation under California's false adver-

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[89] Sol Picciotto, *Rights, Responsibilities and Regulation of International Business*, 42 COLUM. J. TRANSNAT'L L. 131, 139-140 (2003).

[90] OECD, CODES OF CORPORATE CONDUCT: AN EXPANDED REVIEW OF THEIR CONTENTS (Working Paper on International Investment No. 2001/6, May 2001) [hereinafter OEC EXPANDED REVIEW], *available at* http://www.oecd.org/dataoecd/57/24/1922656.pdf (last visited Nov. 16, 2004).

[91] Picciotto, *supra* note 89, at 143 (discussing the implementation of corporate codes).

[92] *See* OECD EXPANDED REVIEW, *supra* note 90 (examining the contents of corporate codes).

[93] Picciotto, *supra* note 89, at 145.

[94] *Id.* at 145-46.

[95] Lee Weinstein, Letter to the Editor, *Nike Defends Its Record on Labor*, S.F. CHRON., Feb. 27, 1997, at A20.

tising laws.[96]

That TNCs are increasingly choosing to adopt such codes, particularly when adopted in response to concerns about investor opinion or fears of government regulation, demonstrates that information about compliance with human rights and labor regulations is, in fact, material information to investors as well as to customers. Public reporting regarding compliance with these voluntary codes provides a type of accountability even when compliance is voluntary.[97]

3.2.2.4. Growth of Socially Responsible Investment ("SRI") Funds

SRI funds provide another indication that investors consider social responsibility in making investment decisions. SRI funds generally refer to those that seek to invest in profitable corporations that also have "respectable employee relations, strong records of community involvement, excellent environmental impact policies and practices, respect for human rights around the world, and safe and useful products."[98] Decisions regarding whether to include specific companies are made by the funds, but many use certification by Social Accountability International ("SAI") as a basis for inclusion.[99] In another indication that corporate social responsibility is material to investors, the number of SRI funds grew considerably during the 1990s, increasing eightfold from 1995 to 1997.[100] This growth has continued into the early twenty-first century. As of 2003, there were 200 socially responsible mutual funds, up from 139 in 1997.[101] Moreover, assets in such funds have in-

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[96] *See* Kasky v. Nike Inc., 45 P.3d 243, 258 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003) (per curiam) (discussing Nike's alleged use of letters to the editor to influence consumers).

[97] *See* HAUFLER, *supra* note 26, at 75 (describing various mechanisms of accountability).

[98] Social Investment Forum, *Social Screening*, *at* http://www.socialinvest.org/areas/sriguide/Screening.htm (last visited Oct. 11, 2004).

[99] These standards were developed by the Council on Economic Priorities in 1998. The SA 8000 standards, as they are called, include process and performance standards. Social Accountability International ("SAI") administers these standards and trains social auditors, who are then hired by companies to determine whether they can be certified as meeting the SA 8000 standards. HAUFLER, *supra* note 26, at 64-65.

[100] Williams, *supra* note 10, at 1268 (citations omitted).

[101] SOC. INV. FORUM, 2003 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES, at i-ii (2003) (detailing rates of investment in socially responsible investment funds), *at* http://www.socialinvest.org/areas/research/trends/

creased by eleven percent from 2001, to $151 billion in 2003.[102] This increase in investment in SRI funds clearly demonstrates investor concern regarding socially responsible activities overseas. Should a SRI fund later be required to sell such stock that it had previously purchased on the basis of false or misleading statements, the investment fund could also use such statements as the basis of a Rule 10b-5 claim.

3.2.2.5. Social Responsibility and Corporate Economic Performance

Most importantly, when corporations do choose to disclose information related to environmental, labor, and human rights obligations, such disclosures have had an impact on corporate profits and, therefore, on shareholder profits.[103] This link between corporate profits and disclosure of social responsibility compliance provides perhaps the best evidence of the materiality of social responsibilities.

Beginning in the 1970s, the SEC began to require corporate disclosure of "financially material environmental information."[104] The requirement continues today, with companies required to make disclosures under Item 303 of Regulation S-K regarding "material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."[105] Uncertain events must be disclosed unless management has determined that "a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur."[106]

Corporations must also disclose "material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party

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sri_trends_report_2003.pdf (last visited Nov. 16, 2004).

[102] *Id.*

[103] *See generally* REPETTO & AUSTIN, *supra* note 61, at 5 (noting that this impact is largely positive).

[104] *Id.* at 6. Stock prices are affected by disclosure of "information regarding emissions (even if legal), or failure to comply with environmental regulations, or potential liability to environmental remediation requirements." *Id.*

[105] 17 C.F.R. § 229.303 (2001).

[106] Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 54 Fed. Reg. 22427, 22430 (May 18, 1989).

or of which any of their property is the subject."[107] Under Section 103 of Regulation S-K, corporations must disclose any legal proceeding, no matter what the subject of the proceeding is, if: it is material; it involves a claim for more than 10 percent of current assets; or it involves the government and potential monetary sanctions greater than $100,000.[108]

As a result of environmental disclosure requirements, scholars have had the opportunity to study whether liability for domestic environmental violations affects corporate profits and shareholder returns. Some studies have indicated that corporations that make "fuller financial disclosure themselves suffer fewer adverse market impacts when outside information becomes available . . . ."[109] Moreover, studies have shown repeatedly that corporate stock prices "have been influenced by disclosure of information regarding emissions (even if legal), or failure to comply with environmental regulations, or potential liability to environmental remediation requirements."[110]

In addition, there is evidence that the failure to adequately address environmental obligations will cause a reduction in profits for some companies. One study by Claros Consulting demonstrated that Exxon Mobil risked losing up to $50 billion worth of stock value as a result of damage to its reputation because of its "hard-line stance on global warming."[111]

Just as compliance with environmental obligations can affect corporate profits, compliance with human rights and labor obligations will likely affect corporate profits, particularly because in recent years investors and consumers have increased their pressure on corporations to abide by good social practices. For example, Nike's stock price tumbled in the aftermath of accusations that the company had used low-wage and underage labor in its factories in Asia.[112] Although Nike officials contend that the drop in stock price resulted from the Asian economic crisis, and not from the negative publicity surrounding Nike's labor practices in Asia,

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[107] 17 C.F.R. § 229.103 (2001).

[108] *Id.*

[109] REPETTO & AUSTIN, *supra* note 61, at 3.

[110] *Id.* at 6.

[111] CHRIS LASZLO, THE SUSTAINABLE COMPANY: HOW TO CREATE LASTING VALUE THROUGH SOCIAL AND ENVIRONMENTAL PERFORMANCE 44 (2003).

[112] *See* Williams, *supra* note 10, at 1286 (describing how "Nike's earnings fell dramatically in 1998, at least in part as a result of the continuing negative publicity concerning the labor conditions in its overseas factories.").

Nike's chairman also indicated that the effort to improve working conditions in Nike factories overseas was being made in an effort to eliminate "the cloud that has been over Nike's head."[113]

Other corporations that have come under attack in recent years include Royal Dutch Shell, Unocal, The Gap, Starbucks Coffee, Levi-Strauss, Macy's, and Liz Claiborne.[114] Many of these corporations have responded to accusations regarding their international activities by instituting codes of conduct,[115] publicly denying the violations,[116] and publicly affirming plans to change their practices.[117] Such corporate responses indicate that corporations themselves recognize that individual investors, fund managers, and customers consider corporate responsibility important when making investment and purchasing decisions. Thus, international environmental and social obligations are increasingly becoming "material" for the purposes of investment decisions—primarily by socially conscious investors, but also by investors driven by economic concerns.[118]

Industry studies have also demonstrated that general investors are concerned with social responsibility. A 1998 survey of investors showed that "71% of respondents said that if they knew that a company was investing in non-ethical areas, it would affect their decision to buy shares."[119]

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[113] Bill Richards, *Nike Hires an Executive from Microsoft for New Post Focusing on Labor Policies*, WALL ST. J., Jan. 15, 1998, at B14 (discussing Nike's appointment of a vice president for corporate and social responsibility).

[114] *See* Spar, *supra* note 16, at 7-9 (noting various corporations' responses to criticism of their human rights records).

[115] *See, e.g.*, Press Release, Wal-Mart Inc., Wal-Mart Statement Regarding Hard Copy (Nov. 24, 1997) (issuing a public statement regarding its position on sweatshop labor as well as a copy of its code of conduct), *at* http://www.walmartstores.com/wmstore/wmstores/Mainnews.jsp?BV_SessionID=@@@@0062165523.1100503475@@@@&BV_EngineID=ccciadcmjgijhegcfkfcfkjdgoodglh.0&pagetype=news&template=NewsArticle.jsp&categoryOID=-8300&contentOID=8816&catID=null&prevPage=NewsShelf.jsp&year=1997 (last visited Nov. 16, 2004).

[116] *See, e.g.*, Kasky v. Nike Inc., 45 P.3d 243, 248-49 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003) (per curiam) (listing some of the public statements made denying accusations of sweatshop labor in Asia).

[117] *Id.*

[118] *See* Williams, *supra* note 10, at 1243 (discussing the House Committee Report accompanying the House version of what eventually became the Securities Exchange Act of 1934, and noting its call for "a renewed sense of public responsibility on the part of corporate managers and the exchanges.").

[119] Jonathan Hall, *Corporate Branding: Putting Ethics Under the Microscope*, BRAND STRATEGY, Sept. 28, 1998, at 10.

3.2.2.6. Legal Liability and the Impact on Corporate Profits

The U.S. Congress has also responded to concerns regarding overseas labor violations by TNCs by enacting rules limiting importation of goods made under adverse conditions. For example, in 1998, Congress added a provision to a funding bill that prohibited the importation of products manufactured by "forced or indentured child labor."[120] Because of this and similar laws,[121] any corporation doing business overseas with child labor will be adversely economically affected by the failure to comply with such laws.

In addition, the growth of claims against TNCs under the ATCA, and the potential liability this presents, will have an impact on corporate profits. Corporations that fail to disclose potential liability under the ATCA could be liable under securities laws for failing to disclose such liability and its effect on future corporate profits.[122]

3.2.3. Reliance and the Fraud-on-the-Market Theory

Reliance is a key element of Rule 10b-5 causes of action because it demonstrates "the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury."[123] Reliance can be one of the most difficult elements of the case to prove, but the effort was made easier for plaintiffs when the Supreme Court approved the fraud-on-the-market theory in the context of Rule 10b-5.[124]

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[120] Treasury Advisory Committee on International Child Labor Enforcement, 63 Fed. Reg. 30, 813 (proposed June 5, 1998) (discussing the enforcement of the child labor amendment).

[121] States have also enacted selective purchasing laws. However, some of these laws have been struck down as unconstitutional. *See* CHRISTOPHER L. AVERY, BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE 44 (2000) (reporting on sources of pressure on companies to act responsibly in areas of human rights).

[122] Two examples of such laws are Section 103 of Regulation S-K, which requires disclosure of legal liabilities, and Section 303 of Regulation S-K, which requires disclosure of trends that may have an effect on corporate profits. 17 C.F.R. § 229.103-229..303.

[123] *See* Basic, Inc. v. Levinson, 485 U.S. 224, 243 (1988). For an explanation of fraud-on-the-market theory, see *infra* Section 3.2.4.2.

[124] *Basic Inc.*, 485 U.S. at 250 ("It is not inappropriate to apply a presumption of reliance supported by the fraud-on-the-market theory.").

3.2.3.1. Reliance

Over the years, the Supreme Court has considered several factors in determining whether the reliance requirement is established in private actions under Rule 10b-5. In *Affiliated Ute Citizens v. United States*, the Court held that "positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material . . . ."[125] However, the Court has narrowed the *Ute* holding to apply only to situations of omissions. In cases of misstatements, the Court has held that a showing of reliance is required.[126]

3.2.3.2. Fraud-on-the-Market Theory

Fraud-on-the-market theory offers an alternative to a showing of reliance in sustaining a private Rule 10b-5 claim. The fraud-on-the-market theory asserts that in an "efficient market" the stock price will reflect all information relevant to the value of the stock.[127] In determining whether to purchase a security, investors can rely on the price of the security as an accurate reflection of the value of the stock.[128] When a corporation's stock price has been manipulated by false or misleading statements made by the corporation, investors have a "rebuttable presumption of reliance on the defrauded market."[129]

In *Basic, Inc. v. Levinson*, the Supreme Court accepted the basic premise of the fraud-on-the-market doctrine, holding, "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action."[130] In making its decision, the Court relied on studies demonstrating that "market professionals generally consider most publicly announced material statements about companies, thereby affecting

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[125] Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153 (1972).

[126] SODERQUIST & GABALDON, *supra* note 71, at 148 (discussing the Supreme Court's "substantial likelihood" test that a reasonable investor relied on an omitted fact that significantly altered the complete mix of available information).

[127] *See* Bruce D. Cohen, *Dredging the Shores Doctrine: Trends in the Fraud-on-the-Market Theory in the New Issues Context*, 23 GA. L. REV. 731, 731 (1989) (discussing the theoretical background to the fraud-on-the-market theory).

[128] *Id.* at 732 (citing the Ninth Circuit's adoption of the fraud-on-the-market theory that in the open securities market, the price of a stock reflects the proper value of the stock).

[129] *Id.*

[130] Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988).

stock market prices."[131] The Court further noted that misleading statements will "defraud purchasers of stock even if the purchasers do not directly rely on the misstatements."[132]

Even under the fraud-on-the-market theory, courts may consider the intended audience of the misstatements at issue. For instance, in *Hemming v. Alfin Fragrances*, the district court indicated that when advertisements or other statements are aimed at consumers of a product rather than corporate investors, the "'in connection with' requirement" is not met, even under the fraud-on-the-market theory.[133] Although *Hemming* was decided in the post-*Basic* era, some courts have chosen instead to follow the *Basic* precedent and have permitted consumer advertising to be used as an indication of fraud-on-the-market.[134]

Ultimately, the courts generally consider the reliance and "in connection with" requirements on a case-by-case basis, looking at the distribution, target audience, and other factors in determining whether the requirements are met.[135]

3.2.4. Intent to Deceive or Recklessness

Finally, private investors must show that the defendant corporation acted with scienter, or intent to deceive. In *Ernst & Ernst v. Hochfelder*, the Court held that scienter was required to sustain a Rule 10b-5 claim, defining scienter as "a mental state embracing intent to deceive, manipulate, or defraud."[136] Courts have expanded the contours of this requirement in recent years to include "recklessness" within the definition of scienter.[137]

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[131] *Id.* at 247 n.24.

[132] *Id.* at 242 (quoting Peil v. Speiser, 806 F.2d 1154, 1160-1161 (3rd Cir. 1986)).

[133] Hemming v. Alfin Fragrances, Inc., 690 F. Supp. 239, 244-45 (S.D.N.Y. 1988) (holding that advertisements that were widely distributed, including in the *New York Times Magazine*, could not meet the "in connection with" requirement because they discussed the product qualities rather than the financial condition of the company).

[134] *See, e.g., In re* Carter-Wallace Inc. Sec. Litig., 150 F.3d 153, 155-57 (2d Cir. 1998) (holding that advertisements in medical journals may be "in connection with" the purchase or sale of a security).

[135] *Id.*

[136] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193-94 n.12 (1976).

[137] *See* SODERQUIST & GABALDON, *supra* note 71, at 142, 151 (finding that although *Hochfelder* left open the question of whether recklessness is sufficient for scienter, most courts have found that it is sufficient).

4. LIMITATIONS OF USING RULE 10B-5 TO APPLY TO TNCS' OVERSEAS CONDUCT

In addition to the materiality requirements addressed above, there are several issues that will limit the facility with which shareholders can use Rule 10b-5 to hold corporations accountable for violations of international human and labor rights standards.

4.1. Advertising and Rule 10b-5

One obstacle that activists must overcome in bringing Rule 10b-5 claims against TNCs is that the TNCs may argue that statements regarding working conditions in their foreign operations or environmental conditions could be construed as "advertising" and therefore not subject to regulation under securities laws.[138] While this could be true for some corporate statements, in others the content of the information released by the corporations[139] is clearly targeted at investors as well as consumers.[140] Moreover, although there is currently greater interest among consumers than investors for products that are made by socially responsible corporations, evidence exists showing that investors increasingly deem social issues important in determining where to invest.[141]

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[138] As stated previously in this Comment, advertising is not always considered "material" for the purposes of Rule 10b-5, particularly if the advertising is of the more traditional type, aimed at consumers and discussing the characteristics of the product. *See, e.g., Hemming*, 690 F. Supp. at 244 (holding that advertising in the *New York Times Magazine*, although widely distributed, was not sufficient to establish the "in connection with" requirement for Rule 10b-5 because it was aimed at consumers rather than investors). *But see* In re *Carter-Wallace Inc. Sec. Litig.*, 150 F.3d at 156-57 (holding that advertisements in medical journals may meet the "in connection with" requirement).

[139] *See, e.g.*, Kasky v. Nike Inc., 45 P.3d 243, 248 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003) (per curiam) (where the information released in Nike advertisements included information about the findings of a report studying the working conditions in its overseas operations).

[140] For example, The Gap, Inc.'s 2002 Annual Report included a section on ethical sourcing, in which Gap affirms its commitment to its Code of Vendor Conduct and vendor compliance with international labor standards. THE GAP, INC., 2002 ANNUAL REPORT 7 (2002).

[141] *See, e.g.*, News Release, Social Investment Forum, Report: Socially Screened Investment Assets in U.S. up by 7 Percent in Last 2 Years (Dec. 4, 2003) (listing the increasing numbers of socially responsible investment funds), *available at* http://www.socialinvest.org/areas/news/120403release.htm (last visited Oct. 11, 2004).

4.2. PSLRA and Limits on 10b-5 Actions

In 1995, Congress enacted the Private Securities Litigation Reform Act[142] ("PSLRA"), which provides a safe harbor for forward-looking statements if the statement is "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement."[143] Thus, corporations may not be liable for material differences in future earnings as long as future projections are accompanied by a statement warning investors that earnings may be different from those projected. However, cautionary statements can not be "boilerplate;" rather, they must identify the "important factors" that could cause material differences between actual results and the corporate projections.[144] A recent Seventh Circuit case may further limit this safe harbor for corporations. In *Asher v. Baxter Int'l Inc.*, the court refused to dismiss for failure to state a claim on which relief may be granted, holding that a decision regarding whether the "differences between the projections and the outcome were material" could not be determined on the basis of the pleadings.[145]

5. BENEFITS AND LIMITATIONS OF RULE 10B-5 ATTEMPTS TO FORCE CORPORATE COMPLIANCE WITH INTERNATIONAL STANDARDS FOR HUMAN RIGHTS AND ENVIRONMENTAL OBLIGATIONS

Rule 10b-5 actions can be difficult to start and to see through to satisfactory conclusions. One obvious problem is identifying investors who have either purchased or sold securities within the period where the misrepresentation is applicable, and who are willing to bring suit against the corporation. Secondly, individual investors seeking to bring suit against large corporations can be stymied by the overwhelming expenses involved. However, these problems can be resolved somewhat if SRIs get financial and strategic support from social activist organizations in bringing such claims.[146]

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[142] 15 U.S.C. §§ 77z-2(c), 78u-5(c) (2004).

[143] 15 U.S.C. §77z-2(c)(1)(A)(i).

[144] *See* Asher v. Baxter Int'l, Inc., 377 F.3d 727, 732, 734 (7th Cir. 2004) (holding that projections which fail to mention risks that executives were aware of are materially false financial statements).

[145] *Id.* at 735.

[146] For example, the case against Nike was brought by Marc Kasky with the support of activist organizations, such as the Sierra Club. Kasky v. Nike Inc., 45

Finally, a potentially debilitating limit to a Rule 10b-5 claim is that the defendant corporation must have actually made misleading statements in public.[147] Because there is no requirement by the SEC that corporations disclose information regarding their social and environmental activities in their overseas ventures,[148] bringing such a claim requires that corporations voluntarily make such disclosures.[149] Corporations that choose not to disclose information about their overseas operations cannot be held liable for failure to disclose under Rule 10b-5 (unless the omission of such information is considered "material"). As a result, some corporations may decide, in order to avoid liability completely, that they will simply not disclose information regarding their overseas organizations, particularly if the disclosure of such information would be harmful to the corporation's public image. For example, in the wake of the litigation surrounding Nike's false statements in California, Nike has announced that it will no longer publicly disclose information regarding its labor practices in its Asian subsidiaries.[150] Ultimately, a reaction such as Nike's would be a disservice to investors because it would have the effect of actually reducing the information available on the market.[151]

However, given the growing number of SRIs[152] and socially responsible consumers, TNCs that refuse to release information regarding overseas operations will likely come under increasing scrutiny. Ultimately, information regarding overseas operations is important not just to socially responsible investors, but also to those investors who are concerned about the financial stability of TNCs.[153] In addition, U.S. courts are increasingly willing to hear

P.3d 243, 246 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003).

[147] *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 861-62 (2d Cir. 1968) (holding "that Rule 10b-5 is violated whenever assertions are made . . . in a manner reasonably calculated to influence the investing public").

[148] *See* Williams, *supra* note 10, at 1243 (discussing how the market currently provides information on a company's social effects).

[149] *Id.*

[150] Reddy, *supra* note 46.

[151] Financial markets, under the efficient-market theory, require that all available information be reflected in the stock price. If corporations refuse to release information, then the investor will suffer. *See* Committee on Federal Regulation of Securities, *Report of the Task Force on Regulation of Insider Trading*, 41 BUS. LAW. 223 (1985) (discussing the economic reasons for ensuring that all market-related information is disclosed).

[152] *See* Kendall & Larsen, *supra* note 141 (listing the increasing numbers of socially responsible investment funds).

[153] *See* REPETTO & AUSTIN, *supra* note 61, at 8 (discussing impact of legal liabili-

tort claims against such corporations under the ATCA,[154] which will impact corporate financial stability and may ultimately require that corporations release information regarding their practices that puts them at increased risk of litigation. As such, failure to disclose such information in the future seems a diminishing possibility.

6. CONCLUSION

As globalization increases, and U.S.-based corporations cross borders in search of cheaper labor and production facilities, allegations of human rights abuses by such corporations will likely grow as well. Although there is only limited recourse under U.S. and international law for such abuses, Rule 10b-5 claims by private parties can be effective weapons in the effort to force multinationals to comply with, or disclose their failure to comply with, international human rights and other social obligations.

Ultimately, success under Rule 10b-5 depends in part on the willingness of corporations to make voluntary disclosures regarding their overseas operations. However, this hurdle, seemingly insurmountable just a few years ago, can be overcome increasingly easily today because corporations, in an effort to attract socially conscious consumers and investors, actively promote, even advertise, their commitment to human rights and environmental obligations. As long as consumers and investors continue their pressure on TNCs to disclose their overseas activities, Rule 10b-5 provides an effective weapon for ensuring compliance with international social obligations of TNCs.

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ties on corporate profits).

[154] *See supra* Section 2.3 (discussing the growing use of the ATCA and the attendant problems with bringing a claim under the ATCA).